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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-677

**OWEN EQUIPMENT AND ERECTION COMPANY,
a Nebraska Corporation,**

Petitioner,

vs.

**GERALDINE KROGER, Administratrix of the
Estate of JAMES D. KROGER, Deceased,**

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF FOR RESPONDENT IN OPPOSITION

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The opinion of the United States Court of Appeals for the Eighth Circuit is set forth in Appendix A, pages 1-36 of the Petition. The Order denying the Petition for Rehearing en banc is set forth in Appendix B, page 37 of the Petition.

STATEMENT

In the opinion of Judge Talbot Smith, the factual history of the litigation has been meticulously and accurately set forth in the opinion of the United States Court of Appeals for the Eighth Circuit found in Appendix A of the Petition. Respondent, therefore, adopts such statement as its statement of facts in preference to the Statement of Facts presented by Petitioner.

While Petitioner's statement of facts is accurate insofar as it goes, Respondent feels that the chronological sequence of events has been inadvertently transposed in a manner that tends to confuse rather than clarify.

In addition thereto, therefore, it may be of some assistance to include a brief timetable of the history of the litigation as appears below.

(All references in the Time Table are from Appendix, Volume I filed in The United States Court of Appeals For The Eighth Circuit.)

Time Table

November 24, 1972	Plaintiff's complaint was filed against Omaha Public Power District. (App. I, 4)
August 24, 1973	Omaha Public Power District filed a third party complaint against <i>Owen Construction Co., Inc.</i> (App. I, 7)
September 7, 1973	Omaha Public Power District filed motion for voluntary dismissal of <i>Owen Construction Co., Inc.</i> , asking leave to file an

amended third party complaint against *Owen Equipment and Erection Company*, reciting that it had been confused with respect to the name of the proper defendant. (App. I, 12)

September 7, 1973

The Court entered an order pursuant to the motion ordering:

"That third party Defendant, *Owen Construction Co., Inc.*, an *Iowa Corporation*, should be and hereby is dismissed from this action, with prejudice.

IT IS FURTHER ORDERED that the defendant and third party Plaintiff should be and hereby is granted permission to file an amended Third Party Complaint naming *Owen Equipment and Erection Co.*, a *Nebraska Corporation*, as an additional third party defendant in this action." (App. I, 13-14)

September 11, 1973

Omaha Public Power District filed a third party complaint against *Owen Equipment and Erection Co.* describing such company as "a *Nebraska Corporation*." (App. I, 14-17)

September 28, 1973

Plaintiff filed motion to add a party defendant, *Owen Equipment and Erection Co.*, a *Nebraska Corporation*. (App. I, 19)

October 15, 1973

Owen Equipment and Erection Company filed an answer to the

third party complaint filed by Omaha Public Power District in which it "Admits that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the State of Nebraska" and denied generally all other allegations. (App. I, 19)

October 30, 1973 Omaha Public Power District filed motion for summary judgment. (App. I, 20)

November 9, 1973 Plaintiff filed amended complaint against Owen Equipment and Erection Co. describing it in caption as a "Nebraska Corporation." (App. I, 23-28)

November 27, 1973 Owen Erection & Equipment Co. filed an answer to plaintiff's complaint admitting that it was a corporation "organized and existing under the laws of the State of Nebraska" coupled with a general denial of the allegations of plaintiff's amended complaint. (App. I, 28)

February 12, 1975 Final judgment was entered in favor of Omaha Public Power District against the plaintiff. (App. I, 41)

February 14, 1975 Argument in Court of Appeals.

October 1, 1975 Judgment affirmed by United States Court of Appeals, Eighth Circuit. (App. I, 42-47)

November 14, 1975 A motion for summary judgment filed by Owen Equipment & Erection Co. against plaintiff (which had been filed September 24, 1974) was heard on depositions, affidavits and interrogatories and denied by the Court. (App. I, 48) Nowhere in either the motion for summary judgment or in the evidentiary hearing on the motion did Owen Equipment & Erection Co. raise any issue of jurisdiction or claim a lack of diversity or adduce facts as to where its claimed principal place of business might be. (App. I, 48)

January 12, 1976 Trial commenced and a jury was empaneled. (App. I, 49)

January 13, 1976 Plaintiff's evidence was adduced. (App. I, 51)

January 14, 1976 Just before noon the attorney for Owen Equipment & Erection Co. asked the witness Petersen, secretary of Owen Equipment & Erection Co., an adverse witness called by plaintiff, if the principal place of business of the defendant was in Carter Lake, Iowa, and received an affirmative (App. II, 136) reply. Shortly after one o'clock p.m., on the third day of trial, defendant raised lack of diversity. (App. I, 49-50)

A brief word about the situs of the events involved seems appropriate. The situs of the events giving rise to this litigation is a small piece of land on the west side of the Missouri River. Traditionally, it is believed that this great river clearly marks the boundary between the states of Nebraska and Iowa; indeed, all but limited local maps show it to be. However, many years ago, that river avulsed at one of its bends and left a small piece of land on the west side of the river that remains Iowa. The exact boundary lines in this geographical no-man's land are mostly unmarked and confusing. Several Omaha, Nebraska companies, including the petitioner in this case, own and maintain facilities in the area, some of them being on Iowa land, although they are Nebraska corporations.

The respondent's decedent, the respondent and their family were residents of Iowa but living west of the Missouri River. The petitioner was and is a Nebraska corporation owning large, heavy duty cranes which are mobile and operate in both states in areas completely west of the river as well.

Through the negligence of the petitioner, the Owen Equipment and Erection Company, a Nebraska corporation, plaintiff's husband was killed by electrocution when standing near one of the petitioner's large cranes which was swung into an overhead high tension line, installed by the Omaha Public Power District of Nebraska (OPPD). No complaint is still made that the respondent's decedent was anything but an innocent victim of the negligence of the petitioner nor that the verdict was excessive in any way.

ARGUMENT

I.

DISCUSSION OF THE PETITION FOR WRIT OF CERTIORARI

From a procedural standpoint, if a petition for a writ of certiorari is to be viewed in the light usually employed for the examination of any pleading asking for relief, the petition filed in this case is on its face demurrable, subject to a motion to dismiss or summary action of denial of certiorari.

The reasons for so stating are as follows:

1. Under "JURISDICTION" found on page two of the Petition, it is recited that the opinion and judgment of the Court of Appeals was filed on June 21, 1977, and that a Petition for Rehearing, Motion to Expunge Portions of the Opinion and Suggestion for Rehearing en Banc was filed on the 16th day of August, 1977. Whether this is correctly or incorrectly stated, it is what is shown on the jurisdictional statement in the Petition for Writ of Certiorari. Rule 40 of the Rules of Appellate Procedure for the Courts of Appeals requires such a filing to be within fourteen (14) days after entry of judgment.
2. The requested relief in the Petition for Writ of Certiorari appears at page forty-five (45) in the last paragraph and is as follows:

This petitioner, therefore, respectfully requests that this court grant a writ of certiorari to the United States Court of Appeals

to the Eighth Circuit to review the opinion and judgment of the Eighth Circuit Court of Appeals, rendered in these proceedings on October 16, 1977.

To our knowledge no opinion or judgment was rendered by the Court of Appeals for the Eighth Circuit on October 16, 1977, nor was any other action taken by such Court on that day or any other day near that date.

If we go beyond that and assume that the month was mistakenly described, the only other date that could have conceivably been meant would have been August 16, 1977. Taking a charitable view that the erroneous prayer of the petition was typographical, we come to the conclusion that all petitioner is asking in its petition is to secure a review by the Supreme Court of the correctness of the Court of Appeals in declining to grant a rehearing en banc. The jurisdictional statement in the Petition (page 2, line 13) recites that "The petition for Rehearing en Bank was denied by an evenly divided court."

This is purely discretionary as Rule 35 reads, "Such a hearing or rehearing is not favored and ordinarily will not be ordered except "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."

Even if petitioner's full prayer for relief as expressed in the Petition were to be granted, the extent of this grant would seem to be limited to a remand to the

Court of Appeals to hold a rehearing en banc. It is difficult to see how such would be effective in disposing of the litigation.

II.

DISCUSSION OF CASES CITED BY PETITIONER

Elaboration on the opinion of Judge Talbot Smith, Senior District Judge, Eastern District of Michigan, who sat with the Court of Appeals for the Eighth Circuit in this case would indeed be "gilding the lily." His obviously meticulous research of both the facts and the law of the case needs no embellishment by the respondent.

While confining the effect of the opinion narrowly to the particular and unique facts of the case at bar, we submit that his research of the history of the principles involved constitutes a most scholarly treatise on the subject under consideration.

We submit that the manner in which he distinguishes the cases relied on by the petitioner accomplishes that precious combination of legal idealism combined with practical trial realism that leads inevitably to what is undeniably a just result. In doing so, he takes this particular case as it is without doing violence to doctrines prevailing in other cases under different fact situations.

III.

PETITIONER'S CLAIM OF FIFTH AMENDMENT VIOLATIONS

The only new matter raised by petitioner is, we suggest, an attempt to "red flag" the case and attract the attention of the Court by injecting the magic of a claimed violation of constitutional rights.

The bizarre theory advanced in support of this is the claim that petitioner's attorney was deprived of his rights by the fact that he was interrogated by the three judges on a matter on which he was unprepared and that such interrogation resulted in eliciting damaging admissions from him during the oral arguments.

While apparently not regarding the client's interests as worthy of even a request for stay of the mandate (the mandate was sent down to the United States District Court on August 23, 1977), petitioner's attorney elects to continue to the utmost his charges of unfair treatment and seek still another forum in which to vent his ire.

The history of such friction with the courts began on February 6, 1976, at that time against the Honorable Robert V. Denney who has, since 1971, served as an honored, respected United States District Judge for the District of Nebraska. The attack upon Judge Denney is in the motion for new trial that may be found at page 91 of Vol. I of the Appendix filed in the Court of Appeals. To his credit, Judge Denney graced himself, as a less temperate judge might not have, and simply prefixed his memorandum opinion with the following:

"The Court shall ignore counsel's irrational inflammatory language in his supporting brief directed at his misconception of judicial impropriety, and shall address the legal issues raised." (App. I, 121)

Most recently, in the Petition for Writ of Certiorari, (pages 36-37) the three judges of the United States Court of Appeals who heard the case have become the targets of petitioner's discontent.

Petitioner's counsel complains that his Fifth Amendment rights were violated by the Court of Appeals because of, as he himself puts it, "findings of underhanded, unethical conduct." (See page 37, Petitioner's Brief.) He further claims that:

"The court's opinion unequivocally claims petitioner has perpetrated acts of fraud, not only upon the respondent but upon the Federal judicial system." (Page 36, Petitioner's Brief.)

In the opinion in this case (App. A, Page App. 4) the Honorable Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation, states at Paragraph 2 on that page:

Appellant *finally* admitted on oral argument to us, *after close questioning*, a point clear from the pleadings, namely, that it had not specifically challenged the diversity jurisdiction of the court at any time during the long course of the pleadings, and particularly had not done so in response to the plaintiff's amended complaint filed on November 9, 1973, charging Owen to be "a Nebraska corporation with its principal place of business in Nebraska." (emphasis ours)

Where was the Fifth Amendment violated by a court questioning a lawyer arguing a case before them? Are *Miranda* warnings required to be given?

All three judges who conducted the questioning agreed on the subject of misdirection, deception, deceit, and as petitioner chooses to put it, "findings of unethical and underhanded conduct."

We submit that if a favorable result based on jurisdiction can be achieved by these methods then it could also be achieved by false answers to discovery interrogatories or perjury in discovery depositions — the principle would be the same. Penalties later levied against the malefactors would be of little value to a widow and children sent empty handed from the court system.

The pattern of misstatement continues even at this moment in this court.

At line 18 of page 36 of the petitioner's brief for certiorari filed herein, we find this statement:

"The issue of the concealment of the citizenship of the petitioner never matured until oral argument was had before the Eighth Circuit."

Yet, in Judge Denney's Memorandum Opinion of February 6, 1976, we find:

"Likewise, defendant's exception to this Court's comments concerning defendant's long silence on the jurisdictional issue is the result of failing to comprehend the Court's holding. This Court held that retention of ancillary jurisdiction is discretionary with

the trial court. The untimeliness of defendant's motion is unquestionably relevant to the exercise of discretion." (App. I, 121)

To further correct the misstatement by the petitioner in its present brief before this Court, i.e., that the issue of concealment came up for the first time during oral argument before the Court of Appeals, we need only note that on January 22, 1976, the memorandum opinion of Judge Denney stated:

"Despite the fact that defendant has exclusive knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska." (App. I, 86)

We submit that in view of the foregoing the purported naivete of the petitioner and the claims that the interrogation by the judges of the Court of Appeals took their attorneys by surprise become difficult to believe. An attempted exculpatory affidavit, signed by another of the attorneys for the petitioner after the opinion of the Court of Appeals, was, of course, not subject to impeachment either by confrontation or cross examination and adds or detracts nothing from a situation correctly diagnosed by all three judges of that court. It should be noted that if the facts contained in the *ex parte* affidavit were valid, those facts would have been available at the time of the oral argument in verbal response to the "close questioning" of the Court of Appeals on this exact subject.

CONCLUSION

It is respectfully submitted by the respondent that the scholarly opinion of Judge Smith logically distinguishes the cases urged by the petitioner in a manner devoid of violence to the holdings contained therein, prevents a gross miscarriage of justice in this particular case and adds valuable guidelines to standards of conduct in the trial of cases in the courts of the United States, both at the trial and appellate level.

The grueling, uphill, five year battle in the courts by the widow of James Kroger should, we submit, end at this point with the just compensation that is her entitlement.

Respectfully submitted,

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